(3)

No. 87-1132

IN THE

Supreme Court of the United States

October Term, 1987

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4118 AND THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4117,
Petitioners,

vs.

SANTA BARBARA FOUNDATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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I.

PETITIONERS' QUESTION RESTATED

Whether a California *cy pres* construction to fulfill the general charitable intent of its domiciliary's last will and testament is entitled to full faith and credit by a sister state in determining the effective exercise of a special testamentary power of appointment conferred by a non-domiciliary trust.

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No. 87-1132

IN THE

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THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4118 AND THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4117,
Petitioners,

vs.

SANTA BARBARA FOUNDATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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STATEMENT OF FACTS

Petitioners' statement of the case, including the chronology of events giving rise to the claim, is fair and accurate, and requires no amplification from respondent.

SUMMARY OF ARGUMENT

The substantial federal question which petitioners jointly present was not properly raised before or decided by the Ohio Supreme Court, as a result of which exercise of jurisdiction under 28 U.S.C. §1257 is inappropriate. As Trustee of Trust No. 4117, the stakeholder trust, petitioner declined to submit any arguments or assert any position at the state trial, appellate, or supreme court level. Having elected not to participate below, it cannot seek ultimate review from this Court.

The Trustee of Trust No. 4118, the rival claimant to the appointed assets, similarly failed to raise or preserve the "minimum contacts" personal jurisdiction challenge. Its papers filed below did not disclose with reasonable precision its Fourteenth Amendment claim. To the contrary, its brief is silent on that issue.

The constitutional arguments presented here were not raised by petitioners or decided by the Ohio Supreme Court. Introduction of these claims at this juncture is insufficient to warrant review.

REASONS FOR DENYING THE WRIT

I. Petitioner Trustee of Trust No. 4117 Has Failed to Raise or Preserve Any Federal Constitutional Issue.

Petitioner Trustee of Trust No. 4117 is the trustee of the irrevocable trust, the disposition of whose assets have engendered the controversy below. In all proceedings at the state level, it had assumed the position of neutral stakeholder, retaining the appointed share of the assets pending judicial determination of entitlement. Apart from initiating the trust construction action in the trial court, the stakeholder trustee has not participated in any proceedings. [Appendix at A1-A6, A11-A12.] It did not brief or argue the issue in the trial court, the state appellate court, or the state supreme court. [Appendix at A12.] It now has no standing to petition for the writ, since by its own deliberate omissions, it failed to raise and preserve the due process Fourteenth Amendment issue it seeks to assert.

Under Ohio law, a trustee acting as a stakeholder with no duty to perform other than to pay out funds to various claimants as ordered by a proper court has no right to appeal from that order, even though he thinks that the court erred in making it. *The Toledo Trust Co. v. Farmer*, 165 Ohio St. 378 (1956); *In re Trustees under Will of Yost*, 102 Ohio App. 62 (1956). The Ohio Supreme Court in its decision declared that the appointed assets should be distributed to respondent Foundation; upon remand, the trial court ordered it. Further participation by the trustee is unauthorized under Ohio law, by reason of which it lacks standing to proceed.

Even more, it is evident that petitioner stakeholder trustee has failed to raise, present, or preserve a federal constitutional issue. It consciously elected not to appear

in the California proceedings. Apart from filing the construction action, it intentionally chose not to participate in the Ohio action from the trial court throughout the entire appellate review process. Its conduct was not a series of inadvertent omissions, but calculated tactics employed by a multi-state commercial trustee upon the advice of well-regarded counsel. Having chosen a strategy of non-participation, disappointment with the result affords neither state nor federal right of review.

No due process Fourteenth Amendment claim premised on a want of personal jurisdiction was even presented by this petitioner to the lower courts. Having declined to formulate and assert any constitutional issue before the state trial, appellate, or supreme courts, it can hardly demand consideration of its claim before this Court. *Hill v. California*, 401 U.S. 797 (1971); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

II. Petitioner Trustee of Trust No. 4118 Has Failed to Raise or Preserve the Constitutional Issue for Which It Seeks Review.

Petitioner Trustee of Trust No. 4118 is the designated taker in default should it be determined that the lifetime beneficiary of Trust No. 4117 failed to exercise the special testamentary power of appointment. Its interests conflict with those of respondent Santa Barbara Foundation, since they alone are the competing claimants for entitlement to the remaining undistributed share of the appointed assets.

Its petition exhibits the same deficiency as that of Trust No. 4117, for it failed to raise, present, or preserve the specific "minimum contacts" personal jurisdiction issue which it now introduces. In opposing discretionary

review by the Ohio Supreme Court, as well as in its briefs on the merits once jurisdiction was exercised, the rival claimant did not ever assert that *it* had no "minimum contacts" with California, that *it* had never "purposefully avail[ed] itself of the privilege of conducting activities within the forum state," or that the exercise of jurisdiction would offend the due process guarantee of the Fourteenth Amendment. [Appendix at A7-A10, A13-A15.]

References to that constitutional provision, as well as citation to the recent personal jurisdiction opinions of this Court, writ so large in the joint petition, are absent from the papers filed in the Ohio Supreme Court. Citation to *Hanson v. Denckla*, 357 U.S. 235 (1958), is made, to be sure. It is noted, however, for the proposition that the California court lacked jurisdiction over the trustee or trust assets, without which a judgment could not be entered, as much as for a want of jurisdiction over the rival claimant. [Appendix at A14-A15.]

Whatever may be petitioners' retrospective significance attached to the citation to *Hanson* in the papers below, it is plain that it was presented to the Ohio Supreme Court as authority for the substantive proposition that the California court could not enter judgment without acquiring jurisdiction over the trustee or assets. Implicit was the contention that the trustee was a necessary party to adjudication of that claim. For that reason, the Ohio Supreme Court distinguished the substantive law principle announced in *Hanson*, and found guidance in the companion analysis employed by the New York Court of Appeals in *In re Morgan Guaranty Trust Co.* (*In re Acheson*), 28 N.Y.2d 155, 320 N.Y. Supp. 2d 905, 269 N.E.2d 571 (1971).

In *Acheson*, as in the court below, the rival claimants insisted that a California court lacked jurisdiction to reform a testamentary instrument the consequence of which construction was to save a power of appointment. Reliance was premised upon *Hanson v. Denckla*. In *Acheson*, as in the court below, the determination was made that a probate court could construe the will consistent with the testator's intention, without requiring jurisdiction over the trustee or trust assets. That construction of the will would then be entitled to full faith and credit in the state charged with administering the trust. No different analysis was applied below than in *Acheson*. The tribunal charged with interpreting the will was entitled to do so; its determination was then entitled to full faith and credit by a sister state in distributing the trust.

Petitioners complain that the Ohio Supreme Court did not find such "affiliating circumstances" with California so as to warrant the exercise of personal jurisdiction. [Petition at 11.] The argument neglects to disclose where, in the jurisdictional papers or in the briefs on the merits, the Ohio Supreme Court was specifically requested to resolve that issue. [Appendix at A5-A15.]

Notwithstanding Trust No. 4118's assertion that the federal claims were timely and persistently raised and decided, the contrary is in fact true. Its papers failed to even cite the Fourteenth Amendment, let alone the trilogy of personal jurisdiction opinions issued by this Court in the 1980s before its brief was filed below.

Trust No. 4118 never presented any due process minimum contacts argument to the Ohio Supreme Court. Even if it were argued that such a significant constitutional contention was present by implication, it

is evident that the state supreme court did not consider it and resolve it. The opinion below, like the papers of petitioners, was silent on such fundamental concepts as minimum contacts and purposeful activity in the forum state.

By Ohio Supreme Court rule,[1] the only matters actually decided are carried forward into its syllabus. It alone reflects the law of the case. *Beck v. Ohio*, 379 U.S. 89 (1964); *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437 (1952). Reference to the three propositions of law articulated by the state court confirm that it never considered, let alone decided, the Fourteenth Amendment due process personal jurisdiction claim.

It is insufficient simply to posit the opinion to the state court, and then contend that all matters addressed in the opinion must necessarily have been considered and resolved by the state court. *Osborne v. Clark*, 204 U.S. 565 (1907). That is all the more apparent here given the breadth of the state substantive and federal procedural issues set forth in *Hanson v. Denckla*.

This Court has repeatedly held that where, as here, "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts." *Street v. New York*, 394 U.S. 576 (1969). Considerations of the federal judicial system, the need to insure that a sound and accurate record is presented, let alone the

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[1] Rule 1(B) of the Supreme Court Rules for the Reporting of Opinions, effective March 1, 1983 recites:

> "The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication."

jurisdictional requisite that the state's highest court actually decide the federal constitutional issue, require that the petitioner affirmatively demonstrate that the claim was presented and actually decided by the court whose judgment is subject to review. *Hill v. California*, 401 U.S. 797 (1971); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). He fails to do so at his peril.

III. A Grant of a Special Testamentary Power of Appointment Is Consent to the Exercise by the Domiciliary Court of Personal Jurisdiction Over the Grantor and Those Claiming Derivatively Under Him in Matters Involving Construction of the Last Will and Testament.

Pointing to alleged *in personam* jurisdictional deficiencies, petitioners insist that enforcement of the California judgment denied them due process of law. The proposition is grounded upon the claim that neither the trustee nor the rival claimant had sufficient "minimum contacts" with California to justify the exercise of personal jurisdiction. Petitioners affirmatively contend[2] that the "Ohio Supreme Court did not find, nor [sic] does the record disclose, any such 'affiliating circumstances.' " [Petition at 11.]

To the extent that the claimed jurisdictional omission is directed at the stakeholder trustee, it is insignificant since the stakeholder had no separate interest in disposition of the assets. It had no distinct right adjudicated in California, since the validity or integrity of the trust was never drawn in issue. Arguments to the contrary are makeweight, since the

[2] As noted above, that issue was never squarely raised with or resolved by the state supreme court. Ultimate judicial review should not be premised on the absence of a decision never in fact addressed to the court.

stakeholder trustee never participated in any of the Ohio proceedings. It would hardly maintain spectator status were its own existence at issue, yet that is the posture it continued to assume until the adverse Ohio Supreme Court decision. Petitioners point to no law, either Ohio or California, which declares the trustee to be an indispensable party to the will construction action. Properly observed, its role was confined to distribution of the assets consistent with the construction made by the California court. *The Toledo Trust Co. v. Farmer,* 165 Ohio St. 378 (1956); *In re Morgan Guaranty Trust Co. (In re Acheson),* 28 N.Y.2d 155, 320 N.Y. Supp. 2d 905, 269 N.E.2d 571 (1971).

Trust No. 4118 as the rival claimant was an interested and affected party since failure of a valid and effective exercise by the lifetime beneficiary would result in a transfer over to this taker in default. The rival claimant echoes the personal jurisdiction objection, again without acknowledging that it failed to present that specific jurisdictional objection in language directed to, or with citation to authority for the absence of, its minimum contacts or purposeful activity in California. Since the inquiry was not raised in the state supreme court, it is inappropriate to assign fault for its having failed to address the issue.

It would be presumptuous to suggest how the Ohio court may have responded, but it may well have found sufficient "affiliating circumstances" to permit the exercise of jurisdiction. Consistent with the analysis formulated by this Court in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985) and *Asahi Metal Industry Co. v. Superior Court of California, Solano County,* 480 U.S. _____, 107 S. Ct. 1026 (1987), the Ohio Supreme Court may well have concluded that the rival

claimant, as taker in default, was bound by the consent to jurisdiction conferred by the settlor in granting the testamentary power of appointment. With a truly passive interest which in no conceivable way could be advanced by its own activity, its status and posture were truly derivative, and its position fully parallel to that of the settlor of the trust. Like an assignee, the rival claimant stood in the shoes of its settlor.

By conferring a special *testamentary* power of appointment to distribute the corpus of the trust, the settlor must have recognized that the testament would be evaluated by a domiciliary court somewhere, for a will not admitted to probate could hardly serve as a testamentary appointment. Even more, a will construed by the domiciliary court might impact the determination whether an effective exercise has been made. While mere foreseeability alone that a claim might surface in a different state has "never been a sufficient benchmark for personal jurisdiction under the Due Process Clause," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), an express consent to the exercise of jurisdiction wherever it may be invoked stands on a different footing. Here, with mobility an essential feature of American life, the settlor knew that another state would ultimately be involved. Why would the trust otherwise contain a choice of law provision? It was inevitable that another state would be called upon to assess the last will and testament. That consequence was invited by the grant of a testamentary power, and could have been avoided by requiring an *inter vivos* appointment lodged in Ohio.

By granting the special power to her daughter to be exercised by will, the settlor conferred upon the income beneficiary the right to select the initial forum for resolution. A warrant of attorney to confess judgment

wherever the holder of a cognovit note may be found is not constitutionally suspect. *Kirbens v. Wodis,* 295 F.2d 372 (7th Cir. 1961). Where a potential defendant, or one claiming derivatively under him, consents in advance to the determination of any forum chosen by the plaintiff, traditional notions of fair play and substantial justice are not offended when the jurisdictional power of a sister state is exercised over a non-resident.

The only forum competent and authorized to probate or construe a testatrix's last will and testament is the state of domicile. In conferring the testamentary power of appointment, the settlor agreed in advance to contest issues related to the will and its construction in the domiciliary forum. That consent necessarily binds the taker in default whose singular interest is entirely derivative of the settlor, and is not avoided merely because the exercise of jurisdiction by the other court produces an unsatisfactory result.

Had the settlor chosen to confine any litigation to Ohio, a forum selection provision might have been recited in the trust instrument. Had the settlor intended that the exercise of a power of appointment be determined solely by an Ohio court, free from construction by a sister state, the trust might have required an *inter vivos* appointment. *Hanson v. Denckla* specifically advised that *inter vivos* dispositions were free from a jurisdictional assault; testamentary dispositions were not necessarily so.

Given the grant of a testamentary power of appointment, wherever it might be exercised, and cognizant of the essentially local nature of a probate proceeding, the settlor must have appreciated that it was

likely that she could be haled into any jurisdiction as a result of the probate of her daughter's will. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). No less an apprehension should have been apparent to the taker in default.

IV. The Forecasted "Disruptive Effect on Trust Litigation" Argument Was Effectively Raised and Rejected Seventeen Years Ago.

Predicting a surge of litigation that will overwhelm both the judiciary and large multi-state commercial trustees, petitioners insist that this Court must intervene to insure that another "regime of 'policing' by the federal courts" over trust administration litigation will not result. At this juncture, the concern is both belated and hollow.

It is curious that such a significant fear should arise only *after* an unfavorable determination. Petitioner trustees were silent on this prospect in all the courts below. Given the result argued for by respondent, it seems that such concerns should have been voiced as strenuously below.

The Ohio Supreme Court firmly stated that matters of will construction are to be determined by the domiciliary forum. Determination of the effective exercise of a testamentary power of appointment is to be made by the state charged with its administration, but with deference to the construction of the will given by the probate state. *In re Morgan Guaranty Trust Co. (In re Acheson)*, 28 N.Y.2d 155, 320 N.Y. Supp. 2d 905, 269 N.E.2d 571 (1971). Below, the supreme court ruled that since the only practical dispute was whether the substituted appointee would take the assets, and even under petitioners' argument an effective exercise would then take place, the substitution of the Foundation for

Alcoholics Anonymous was decisive. Probate determinations do not substitute for trust administration decisions, but they do command full faith and credit.

The prophecy of doom repeated here may differ little from that raised by the disappointed claimants in *In re Morgan Guaranty Trust Co., supra.* They too insisted that *Hanson v. Denckla* had been violated, and might have foretold the same consequences which petitioners here echo. Examination of the opinions over the last seventeen years since certiorari was denied failed to disclose a floodgates consequence. Capable drafting of choice of law and forum selection provisions, as well as careful observance of conflicts of law principles, have enabled most settlors, trustees, and beneficiaries to address those issues. There is no reason to suggest that the difficulty is insurmountable now.

CONCLUSION

For the foregoing reasons, and particularly for the failure of the petitioners to preserve and secure a determination by the Ohio Supreme Court on the constitutional issue which they now raise, the writ should be denied.

Respectfully submitted,

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APPENDIX

COMPLAINT FILED IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO (EXCERPT)

(Filed November 3, 1983)

No. 83-2699

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4117,
Three SeaGate,
Toledo, Ohio 43603,
Plaintiff,

v.

SANTA BARBARA FOUNDATION,
Santa Barbara, California,

ALCOHOLICS ANONYMOUS,
Central Office,
1216 State Street,
Santa Barbara, California 93101,

HON. ANTHONY J. CELEBREEZE, JR.,
Attorney General, State of Ohio,
30 E. Broad Street,
Columbus, Ohio 43215,

THE TOLEDO TRUST COMPANY, as
Trustee of Trust No. 4118,
Three SeaGate,
Toledo, Ohio 43603; and

NANCY S. JONES,
1565 Meadow View Lane,
Reno, Nevada 89509,
Defendants.

COMPLAINT

Donald F. Melhorn, Jr. (5895)
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(419) 243-4200
Attorney for Plaintiff

1. Plaintiff The Toledo Trust Company, an Ohio banking corporation authorized to exercise trust powers, is Trustee of a trust carried on its records as Trust No. 4117, established by written Trust Agreement dated January 28, 1960 between defendant Nancy S. Jones as Donor and plaintiff as such Trustee, a copy of which Trust Agreement is here attached as Exhibit A. The situs of said Trust and the locus of its administration are at plaintiff's office in Toledo, Lucas County, Ohio.

2. Defendant Santa Barbara Foundation is a corporation formed for charitable purposes, organized and existing under the laws of the State of California, and having its principal place of business in the County of Santa Barbara, California.

* * * * *

9. After the death of Marcia MacDonald Rivas, defendant Alcoholics Anonymous, Central Office, declined to accept distribution of any of the assets of Trust No. 4117 appointed to said defendant under the aforesaid terms of the Will of Marcia MacDonald Rivas, except for the sum of Five Hundred Dollars ($500.00),

which sum said defendant was and is willing to accept. At the time of so declining, said defendant was specifically aware of the terms of the Trust Agreement, the terms of the Trust Agreement, the terms of the Will, and of the fact that the value of the property which would have been distributed to said defendant had said defendant not so declined, was substantially in excess of Five Hundred Dollars ($500.00). Said defendant has not thereafter changed its position, and continues to decline to accept any distribution in excess of Five Hundred Dollars ($500.00).

10. On September 16, 1983 defendant Santa Barbara Foundation filed in the Superior Court of the State of California, County of Santa Barbara, a "Petition for Determination of Entitlement to Distribution of Estate." In said Petition, docketed under No. 5M 38985 of the records of said Superior Court, defendant Santa Barbara Foundation alleged that defendant Alcoholics Anonymous, Central Office, had declined as aforesaid, and prayed that said Superior Court determine who is entitled to assets of Trust No. 4117 which, but for said declination, would have passed to said defendant Alcoholics Anonymous, Central Office, pursuant to the aforesaid terms of paragraph (I), Article SIXTH of the Will of Marcia MacDonald Rivas. Plaintiff made no appearance in the aforesaid Superior Court in response to said "Petition," or in any proceedings held in respect thereto.

11. On October 13, 1983 the aforesaid Superior Court made and entered an "Order Determining Entitlement to Distribution of Estate," which purported to determine and direct that such assets of Trust No. 4117 as would have been distributed to defendant Alcoholics Anonymous, Central Office, but for its declining as aforesaid, should now be distributed to

defendant Santa Barbara Foundation, to be held and administered upon a further trust described in the terms of said Order, for the benefit of charitable institutions, organizations and associations located in the County of Santa Barbara, State of California which are exclusively dedicated to rehabilitating, aiding, assisting, educating and otherwise benefiting persons suffering from the effects of alcoholism and alcohol abuse. Copies of said Order and notice of entry thereof are here attached as Exhibit C.

12. Plaintiff The Toledo Trust Company, as Trustee of Trust No. 4117, is in doubt concerning its obligations in respect to the aforesaid Order of the Superior Court of the State of California, Santa Barbara County, and otherwise as to its duties and responsibilities with respect to distribution of the trust assets in question.

WHEREFORE, as Trustee of Trust No. 4117, plaintiff The Toledo Trust Company prays the direction of this Court of Common Pleas of Lucas County, Ohio, respecting the Trust or property to be administered and the rights of the parties in interest; and in particular, that this Court determine the validity and effect of the aforesaid Order of the Superior Court of the State of California, Santa Barbara County, and by such determination or otherwise, advise and instruct plaintiff concerning the proper disposition and application of the trust assets in question. Plaintiff also prays judgment for its costs, and for allowance of its reasonable expenses, including attorney fees, in this proceeding.

/s/ DONALD F. MELHORN, JR.
Attorney for Plaintiff
The Toledo Trust Company,
Trustee of Trust No. 4117

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MEMORANDUM OF APPELLEE THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4117, ON MOTION TO CERTIFY FILED IN THE SUPREME COURT OF OHIO (EXCERPT)

No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Appellee,

vs.

SANTA BARBARA FOUNDATION,
Appellant,

and

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4118,
AND NANCY S. JONES,
Appellees.

Appeal from the Judgment of the Court of
Appeals of Lucas County, Ohio,
Sixth Appellate District

MEMORANDUM OF APPELLEE THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4117, ON MOTION TO CERTIFY

* * * * *

ARGUMENT

The jurisdictional issues presented in this appeal are appropriately addressed by the claimants to the property in question.

Plaintiff-Appellee, The Toledo Trust Company, as Trustee of Trust No. 4117, elects to make no submission concerning such issues.

Respectfully submitted,

/s/ DONALD F. MELHORN, JR.
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MOTION TO DISMISS AND MEMORANDUM OPPOSING JURISDICTION OF DEFENDANTS-APPELLEES THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4118 AND NANCY S. JONES FILED IN THE SUPREME COURT OF OHIO (EXCERPT)

No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4117,
Appellee,

vs.

SANTA BARBARA FOUNDATION,
Appellant,

and

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4118, AND NANCY S. JONES,
Appellees.

Appeal from the Judgment of the Court of Appeals of Lucas County, Ohio Sixth Appellate District

MOTION TO DISMISS AND MEMORANDUM OPPOSING JURISDICTION OF DEFENDANTS-APPELLEES THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4118 AND NANCY S. JONES

* * * * *

Proposition of Law No. 2

> A final judgment of a foreign court lacking jurisdiction of the subject-matter and of the parties need not be accorded full faith and credit.

The discussion under Appellant's Proposition of Law No. 2,

> "Equity will aid the exercise of a power of appointment"

does not reach the ultimate issue, whether equity *should in this case* aid the exercise of Rivas' special power of appointment. Rather, that Proposition of Law is essentially academic, Appellant's claim to the trust assets not having been denied because of any holding of the lower courts contrary to that Proposition.

One is neither shocked nor surprised that the California Court, in an uncontested proceeding, determined that the property should pass to a local charity. Quite aside from any substantive order of the court,[1] however, an examination of the jurisdictional elements of Appellant's resort to equity in the California

[1] Neither court below reached the issue of the applicability of the cy pres doctrine, the trial court having found the failure of effective exercise by Rivas dispositive as a threshold matter (see p. 4, OPINION AND JUDGMENT ENTRY, at Appendix, p. 30, Appellant's Memorandum) and the court of appeals holding that even if this were a proper case to recognize and apply the doctrine, the taker in default would prevail (see p. 6, DECISION AND JOURNAL ENTRY, at Appendix p. 24, Appellant's Memorandum).

Court reveals fundamental infirmities which prohibit an Ohio court from granting full faith and credit to any order issued there.

No one challenges the California Court's jurisdiction over the decedent's estate or *her* property. But,

> "Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power." *Cleveland Trust Co. v. McQuade* (1957), 106 Ohio App. 237, 250.

The Rivas Trust was an Ohio trust, with Ohio assets, an Ohio trustee, and an Ohio taker in default. Appellant makes no claim that the California Court had in rem jurisdiction over the trust assets or personal jurisdiction over the trustee or the taker in default.

Appellee Pawlak Trust, as taker in default of the effective exercise of the special power of appointment, has a vested remainder interest in the appointive property. *Central Trust Co. v. Watt* (1941), 139 Ohio St. 50. Appellant's protestations to the contrary notwithstanding, the California Court cannot destroy vested property rights of persons not parties to that action.

Even if the final judgment of the California Superior Court is construed to purport to establish the effectiveness of the exercise of the special power of appointment, it need not be accorded full faith and credit under Article IV, Section 1 of the United States Constitution. In an unbroken line of decisions, including *D'Arcy v. Ketchem*, 11 Howard 165, 52 U.S. 165, 13 L.Ed. 648 (1850); *Pennoyer v. Neff*, 95 U.S. 679, 24 L.Ed. 565 (1877); and *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283 (1958), the United States Supreme Court has held that a judgment rendered without proper

jurisdiction, either over person or property, is void and is not entitled to full faith and credit in a sister state. This precise conclusion was reached by the Ohio Court of Appeals in *Toledo Trust Co. v. National Bank of Detroit* (1976), 50 Ohio App. 2d 147, m.c.o. September 10, 1976. Such a well-settled principle of constitutional law clearly denies the existence of a substantial constitutional question deserving consideration by this Court, and does not otherwise create a case of public or great general interest.

CONCLUSION

Appellant's motion to certify should be overruled. These Appellees' motion to dismiss the appeal as one not involving any substantial constitutional question should be granted.

Respectfully submitted,

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BRIEF OF APPELLEE THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4117 FILED IN THE SUPREME COURT OF OHIO (EXCERPT)

No. 86-1064

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Appellees.

Appeal from the Judgment of the Court of
Appeals of Lucas County, Ohio,
Sixth Appellate District

BRIEF OF APPELLEE THE TOLEDO TRUST
COMPANY, AS TRUSTEE OF TRUST
NO. 4117

* * * * *

ARGUMENT

The merits of this appeal are appropriately addressed by the claimants to the property in question.

Appellee, The Toledo Trust Company, as Trustee of Trust No. 4117, elects to make no submission concerning such issues.

Respectfully submitted,

/s/ DONALD F. MELHORN, JR.
Attorney for The Toledo Trust Company, as Trustee of No. 4117

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Appeal from the Judgment of the Court of
Appeals of Lucas County, Ohio,
Sixth Appellate District

BRIEF OF APPELLEES THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST NO. 4118 AND NANCY S. JONES

* * * * *

Proposition of Law No. 3

A Final Judgment of A Foreign Court Lacking Jurisdiction Of the Subject-Matter And of the Parties Need Not Be Accorded Full Faith and Credit

With respect to the ex parte proceeding in the Superior Court of the State of California, County of Santa Barbara, Appellant recites at page 4 of its BRIEF that "Notice of the hearing was served by mail upon appellees The Toledo Trust Company and Nancy S. Jones", but Appellant fails to disclose that the entry of that Court purporting to order distribution of the corpus of the Rivas Trust to Appellant issued without the Court having obtained, or attempting to obtain, jurisdiction over the trustee of the Rivas Trust, the trustee of the taker-in-default of the effective exercise and the special power of appointment, the Pawlak Trust, or the trust assets.

Appellant demands in one paragraph on pages 23 and 24 of its BRIEF that full faith and credit be given the entry of the California Superior Court ordering distribution of the renounced appointive assets to it. That demand is squarely at odds with Federal constitutional law and must be rejected.

The Pawlak Trust owns a vested remainder interest in the appointive assets subject to the divestment upon Rivas' effective exercise of her special power of appointment. *Central Trust Co. v. Watt*, above, at 64. Absent jurisdiction over the necessary parties, the California court could not destroy their property rights.

In *Toledo Trust Co. v. National Bank of Detroit* (1976), 50 Ohio App. 2d 147, m.c.o. September 10, 1976, the Lucas County Court of Appeals affirmed the trial court in holding that a Michigan decree authorizing the exercise of a power of appointment by a Michigan guardian on behalf of its Michigan ward over property held in trust in Ohio was not entitled to full faith and credit in Ohio where the Michigan Probate Court lacked jurisdiction over the appointive assets, the trustee, and the takers in default of appointment, the identical

defects in the jurisdiction of the California court. Neither the California decree concerning the construction of the Rivas will nor the Michigan decree concerning the guardianship affected the ownership of the trust assets: a lack of jurisdiction over the appointive assets, the trustee, and the taker in default precludes a valid judgment concerning the disposition of the appointive assets. See *Hanson v. Denckla* (1958), 357 U.S. 235, 2 L. Ed. 2d 1283.

The Court of Appeals implicitly ignored the California decree in determining whether cy pres was applicable in aid of the ineffective appointment. Appellant does not criticize the Court of Appeals' approach in applying its own judgment on the cy pres issue. Ohio courts may not afford full faith and credit to this California decree.

CONCLUSION

Both the trial court and the unanimous Court of Appeals have properly reviewed and analyzed the applicable law in determining that Rivas having failed effectively to exercise her testamentary special power of appointment, the vested remainder interest of the Pawlak trust was not divested and the appointive assets should pass to it. The judgment of the Appellate Court should be affirmed.

Respectfully submitted,

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MOTION FOR REHEARING FILED IN THE SUPREME COURT OF OHIO

Case No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Appellee,

vs.

SANTA BARBARA FOUNDATION,
Appellant,

and

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4118,
AND NANCY S. JONES,
Appellees.

Appeal from the Judgment of the Court of
Appeals of Lucas County, Ohio,
Sixth Appellate District

MOTION FOR REHEARING

Plaintiff/Appellee The Toledo Trust Company, Trustee of Trust No. 4117, respectfully moves, under Rule IX, Supreme Court Rules of Practice, for rehearing and clarification of the Court's August 26, 1987 Opinion, Mandate and Journal Entry.

As Trustee of Trust No. 4117 The Toledo Trust Company brought this action as plaintiff, seeking a determination as to which of two claimant parties,

named as defendants, certain assets of Trust No. 4117 are properly distributable. The claimant parties are Santa Barbara Foundation and The Toledo Trust Company as Trustee of Trust No. 4118.[1]

Trust No. 4117 is governed by a trust agreement, quoted in this Court's August 26, 1987 Opinion, which provides that the property in question shall be distributed either pursuant to the exercise of a special power of appointment, or, if the donee of the power "fails effectively to exercise" it, then to a designated taker-in-default of such exercise. The claim of Santa Barbara Foundation is that the power was effectively exercised in its favor. The claim of The Toledo Trust Company as Trustee of Trust No. 4118 is that the power was not effectively exercised, and that it is entitled to the property in question as taker-in-default.

In the judgment affirmed by the Court of Appeals and here appealed from, the Court of Common Pleas determined that "the exercise of the special power of appointment was ineffective," and ordered distribution accordingly. The Court of Common Pleas further held:

> "In light of the foregoing determination, the Court need not reach the issues of the validity of the California judgment and the applicability of the doctrine of cy pres."[2]

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1. As noted in our Brief, The Toledo Trust Company thus appears in this action as two distinct trust fiduciaries, with distinct interests and responsibilities as to each trust. Besides being separately joined as parties to this action, the trusts are separately represented.

2. Opinion and Judgment Entry of the Court of Common Pleas, filed July 29, 1985, pp. 4-5.

But the August 26, 1987 Opinion of this Court, setting forth

> "... our conclusion ... that the determination of the intent of a donee in exercising a testamentary special power of appointment by a court of competent jurisdiction of the state within which the donee is domiciled at the time of the power's exercise is binding in any subsequent judicial proceedings in Ohio and entitled to full faith and credit with respect thereto,"

and directing remand "to the trial court for further proceedings consistent with this opinion," leaves doubt as to whether, or in what way, this Court has determined the fundamental issue presented by the terms of the trust agreement, as well as by the pleadings and by the judgment of the Court of Common Pleas—the issue of whether the power of appointment was "effectively exercised."

Accordingly, by this Motion for Rehearing, The Toledo Trust Company as Trustee of Trust No. 4117 respectfully seeks clarification of the rulings made in this Court's August 26, 1987 Opinion, in order to provide the trial court with appropriate direction as to the conduct of further proceedings on remand.

Respectfully submitted,

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MEMORANDUM OF APPELLEES THE TOLEDO TRUST COMPANY AS TRUSTEE OF TRUST NO. 4118 AND NANCY S. JONES IN SUPPORT OF MOTION FOR REHEARING FILED IN THE SUPREME COURT OF OHIO

No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Appellee,

vs.

SANTA BARBARA FOUNDATION,
Appellant,

and

THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4118,
AND NANCY S. JONES,
Appellees.

Appeal from the Judgment of the Court of
Appeals of Lucas County, Ohio,
Sixth Appellate District

MEMORANDUM OF APPELLEES THE TOLEDO TRUST COMPANY AS TRUSTEE OF TRUST NO. 4118 AND NANCY S. JONES IN SUPPORT OF MOTION FOR REHEARING

Appellees, The Toledo Trust Company, as Trustee of Trust No. 4118 and Nancy S. Jones, join in the Motion for Rehearing of The Toledo Trust Company as Trustee of Trust No. 4117, for clarification of the effect of the Court's holdings in its August 26, 1987 Opinion.

No standard for rehearing for clarification, or rehearing generally, is established in the Supreme Court Rules of Practice or the case law, but reconsideration generally is appropriate when the request calls to the attention of the Court an obvious error in its decision, or raises an issue for the Court's consideration that was not considered at all, or was not fully considered by it when it should have been. *Matthews v. Matthews* (1981), 5 Ohio App. 3rd 140. For two reasons, these findings are evident in light of the Court's holding on the full faith and credit issue in its Opinion.

First, the issue has not been the subject of genuine contention below. Neither the trial court nor the Court of Appeals discussed or decided the issue. The trial court found that in light of its determination of the threshhold inquiry, a question of trust construction, the question of the validity of the California judgment was moot. The Court of Appeals did not even *consider* the validity of the California judgment and the effect it should be given in Ohio courts. Furthermore, neither of Santa Barbara Foundation's propositions of law in its brief address the full faith and credit issue even remotely, and only one paragraph of its brief, at pp. 23-24, discusses the issue, without citation to legal authority. The question of whose intention controls in determining whether a power

is effectively exercised is the issue which has been disputed and decided below and which came to this Court for ultimate resolution. The additional holding on the full faith and credit issue, without the benefit of analysis by the trial or appellate courts or significant briefing by the parties, seems unwarranted.

Second, and more important, by its Opinion the Court has seemingly ordered the Court of Common Pleas to carry out the decree of the California court on remand. The Appellees concede that the decision of the California court concerning the *validity* of the Rivas will, and even concerning the *determination of her intention* in making the disposition of assets is the proper and exclusive province of the California probate court. If, however, by the Court's holding the trial court is *effectively ordered* to carry out the decedent's intention by further decreeing distribution of the trust funds to Santa Barbara Foundation, that determination is squarely at odds with the constitutional principles of due process and full faith and credit announced by the United States Supreme Court in *Hanson v. Denckla* (1958), 357 U.S. 235. The California decree determined that Santa Barbara Foundation was entitled to the renounced appointive assets. If by its holding this Court is ordering the Court of Common Pleas to honor that decree, the *effect* of that decision is to order distribution of the assets, thereby divesting the vested interest of the taker in default by means of a proceeding in which the California probate court did not, and could not, obtain jurisdiction over the trustee, the trust assets, or the taker in default. *Hanson v. Denckla* positively prohibits such a result.

A brief review of *Hanson v. Denckla* is instructive. A Florida domiciliary, after executing a trust agreement in Delaware and a will exercising a power of appointment over the Delaware trust assets in Florida, died in Florida. A declaratory judgment action was filed in the Florida trial court, which held that it lacked jurisdiction over non-residents, including the trustees, who were "constructively" served, but did not appear. The Florida Supreme Court reversed in part, holding that the non-residents were within the jurisdiction of the court and that the residuary clause under the will governed distribution of the trust assets (100 So.2d 378). A separate action was brought in the Delaware Court of Chancery for a declaration as to who was entitled to the trust assets, and it was held that the exercise of the power of appointment was valid, that the trust assets passed thereunder, and that the Florida judgment was not entitled to full faith and credit. The Delaware Supreme Court affirmed. (128 A.2d 819.) The United States Supreme Court affirmed the judgment of the Delaware Supreme court.

The Court initially determines that the action is one "in rem" inasmuch as the true subject of the litigation were the trust assets held by the Delaware trustee. At p. 246, Chief Justice Warren, speaking for the majority, said,

> The basis of the [in rem] jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State.

The assets of Trust No. 4117 were located in Ohio at all relevant times. The Court then continued:

> The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and

construction of its domiciliary's will, under which the assets might pass, was thought sufficient to confer the requisite jurisdiction. But jurisdiction cannot be predicated upon the contingent role of this Florida will. Whatever the efficacy of a so-called "in rem" jurisdiction over assets admittedly passing under a local will, a State acquires no in rem jurisdiction to adjudicate the validity of the inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the state nor the decedent could claim any affiliation. The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. For the purpose of jurisdiction in rem the maxim that personalty has its situs at the domicile of its owner is a fiction of limited utility. (citations omitted). The maxim is no less suspect when the domicile is that of a decedent. In analogous cases, *this Court has rejected the suggestion that the probate decree of the State where a decedent was domiciled has an in rem effect on personalty outside the forum state that could render it conclusive on the interests of non-residents over whom there was no personal jurisdiction. Riley v. New York Trust Co.*, 315 US 343, 353, 86 L ed 885, 893, 62 S Ct 608; *Baker v. Baker*, E. & Co. 242 US 394, 401, 61 L ed 386, 391, 37 S Ct 152, *Overby v. Gordon*, 177 US 214, 44 L ed 741, 20 S Ct 603. The fact that the owner is or was domiciled within the forum state is not a sufficient affiliation with the property upon which to base jurisdiction in rem. (Id., at 247-249) (emphasis added)

The Court continues by holding that a judgment purporting to govern the distribution of trust assets over which the court rendering the judgment lacked jurisdiction is invalid, stating at p. 250:

> Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction.

Here, the California decree purports to determine the entitlement of Ohio trust assets over which it admittedly had no jurisdiction. This Court's holding that the California judgment did not purport to rest upon jurisdiction over the trust assets, and inferentially the trustee and taker in default, simply cannot be squared with the fact that the apparent intended effect of this holding will compel the Court of Common Pleas to order distribution of the trust assets to Santa Barbara Foundation. The California proceedings here and the Florida proceeding in *Hanson* each suffered from the same jurisdictional defects, defects which the U. S. Supreme Court held nullified the validity of the Florida judgment, but which this Court has held to have no effect on the validity of the California judgment.

If the Court's holding in fact compels distribution of the trust funds to Santa Barbara Foundation in accordance with the California decree, Ohio will be rendered a most inhospitable jurisdiction in which to engage in trust business. Only Ohio trustees and beneficiaries under Ohio trusts will be forced to travel across the country voluntarily to appear and defend lawsuits which affect the trust assets, the trustee or beneficiary, even where there are *no* contacts otherwise with the forum state. This cannot be an intended result of the Court's August 26, 1987 Opinion, but it will be the case.

For the foregoing reasons, these Appellees urge the Court to grant The Toledo Trust Company as Trustee of Trust No. 4117's Motion for Rehearing.

Respectfully submitted,

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